IV. COMMENTERS GENERALLY AGREE THAT DETAILED NATIONAL STANDARDS ARE UNNECESSARY FOR ISSUES RELATING TO ACCESS TO RIGHTS OF WAY. (¶¶ 221-225)

In its initial comments, GTE urged the Commission not to prescribe detailed new rules to govern access to poles, ducts, conduits and rights-of-way (beyond those future rules necessary to formulate applicable rates).[54] In recommending that negotiations over these uniquely local issues be guided by broad principles rather than dictated by intrusive regulations, GTE was joined by a number of commenters.[55] Because the 1996 Act does not evidence any intent to modify existing practice, i.e., reliance on individual negotiations with primary resort to state oversight, there is no reason for the Commission now to reach out and issue detailed rules relating to access to rights of way.[56]

It is important to emphasize that both § 251(b)(4) and § 224 require *all* LECs, not just ILECs, to make their "pathways" available for the use of others. This requirement would include the numerous rights-of-way and

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[54] Comments of GTE at 21-23.

[55] *See, e.g.*, Comments of Ameritech at 33; Comments of Bell Atlantic at 14; Comments of BellSouth at 14; Comments of Pacific Telesis Group at 17-18; Comments of the Rural Telephone Association at 12-14; Comments of SBC Communications at 15-18; Comments of USTA at 9-10; Comments of US West at 15.

[56] As the California PUC points out, the FCC will have the opportunity to address at least some of the issues raised in the *NPRM* in its required proceeding on rate issues, which is expected to begin next month. Comments of California PUC at 2.

associated facilities owned or controlled by AT&T and MCI, to the extent they enter the local exchange market. Thus, any rules, guidelines or other requirements adopted by the FCC to implement these sections must apply equally to such new entrants.

A. Nondiscriminatory Access (¶ 222)

As GTE explained in its initial comments, the requirement to provide "nondiscriminatory access" under § 224(f)(1) requires the owners of facilities to apply the same "just and reasonable" rates, terms and conditions to all third parties obtaining access; it does not relegate the right of the owner to that of a non-owning attaching party. GTE noted that the 1996 Act's requirement that owners pay a disproportionate share of the maintenance costs is inconsistent with the contrary interpretation advanced by some parties.[57] Other commenters explained that such treatment would likewise be contrary to the historical treatment of owners vis-a-vis attaching entities.[58]

None of the commenters arguing for equating the rights of owners and attaching third parties provides any justification for that proposition. In particular, they do not address the plain meaning of the statute, which applies

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[57] Comments of GTE at 23-24. *Cf.* Comments of AT&T at 14-15; Comments of MCI at 23; Comments of Time Warner at 13.

[58] Comments of Pacific Telesis Group at 19-20.

the nondiscrimination requirement only to those for whom access must be "provided," not to the owner, whose "access" is synonymous with its ownership right.[59] Given the historical context set out above and the absence of any contrary indication from Congress, a construction of the statute that relegated the rights of an owner to that of a third-party cannot be accepted. Such a requirement would undermine any incentive to construct such support facilities, render facilities investment and construction planning impossible, and raise serious "takings" issues, as explained in GTE's opening comments.[60]

Certain parties advanced additional arguments for expanding the scope of the attachments requirement in derogation of the property rights of LECs and others. For example, some commenters suggest LECs should provide

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[59] 47 U.S.C. § 224(f)(1).

[60] Comments of GTE at 23-24. AT&T proposes that utilities should provide to telecommunications carriers upon request their cable plats and conduit prints showing the nature and locations of their poles, cables and conduits. Comments of AT&T at 19. Moreover, in its discussions with GTE, AT&T "requires" that GTE create and provide customized diagrams of all conduit systems for use by AT&T -- diagrams that are neither needed by nor useful to GTE. Further, self-described "consultants" have taken advantage of such opportunities to harass LECs with repeated, expensive and invasive requests about the size and scope of a LEC's network, *e.g.*, one consultant has demanded copies of all maps showing all facilities located within a 70 mile radius of Dallas, Texas. The Commission must recognize that these demands are unreasonable. GTE will fulfill its statutory obligation and will make any necessary information available on reasonable and non-discriminatory terms on a case-by-case basis pursuant to a *bona fide* request, subject to network security concerns, protection of GTE's proprietary rights, and reasonable compensation.

attachment rights to third parties for all "pathways" including not only easements across land, but also entrance facilities, telephone closets, vaults or equipment rooms.[61] Obviously, however, the LECs' duties cannot surpass the power of both the LECs *and* the FCC to deliver.

The express language of the 1996 Act requires a LEC to provide nondiscriminatory access only to those rights-of-way in fact "owned or controlled by it." § 224(f)(1). Most of the "pathways" used by LECs on non-LEC property are not in fact controlled by LECs, who are typically present at the sufferance of the owner. In many cases, LEC agreements with such property owners are not even reduced to writing and cannot be assumed to include the right to grant access to third parties. New entrants may seek their own agreements in these circumstances, just as both ILECs and new entrants will be negotiating for access rights to new construction.

AT&T and MCI further argue that an owner should not be permitted to reserve space for future use.[62] Neither provides any basis in the statute, in the legislative history, or in sound policy for advising the FCC to make such an ill-considered pronouncement. Reserving space for future use can be an important part of intelligent and orderly planning in and around growing communities. For example, US West notes that LECs and other utilities virtually always incorporate a reserve requirement in constructing new

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[61] *See, e.g.*, Comments of AT&T at 15.

[62] Comments of AT&T at 16; Comments of MCI at 23.

facilities, usually based on three-to-five year growth projections.[63] Thus, it is not surprising that the Commission recently specifically rejected a suggestion to require LECs to relinquish central office space reserved for their future use and held that proposal to be "neither reasonable nor likely to serve the public interest."[64]

Most importantly, ILECs have special obligations by nature of being providers of last resort. Because they must to be able to serve new customers readily, they must provide for substantial reserve capacity. Withdrawing this ability would impair service to the public and cause extraordinary cost increases.

B. Denial of Access (¶¶ 222-223)

As discussed at length in GTE's initial comments, all "utilities" should be permitted to deny access to their properties "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[65] The vast majority of commenters who address this

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[63] Comments of US West at 18. *Cf.* Comments of SBC Communications at 18-19 (5-year time frame). In fact, the planning horizon for major conduit systems can be much longer, and a LEC must be able to reserve capacity in those systems to satisfy its statutory obligations to serve.

[64] *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd. 7369, 7408 (1992) (Report and Order and Notice of Proposed Rulemaking)

[65] 47 U.S.C. § 224(f)(2); Comments of GTE at 24-25.

issue agree.[66] In fact, only AT&T seriously disputes whether incumbent LECs may deny access for reasons of insufficient capacity or safety.[67] AT&T's suggestion is irresponsible and should not be credited by the Commission. No entity may be placed in the position of providing something that does not exist or endangering its workers and the public for AT&T's convenience.

Safety and capacity raise different, albeit sometimes related, concerns for LECs. As GTE explained in its initial comments, safety concerns are subject to a number of industry standards as well as a variety of federal, state, and local safety codes.[68] The vast majority of commenters recognize

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[66] *See, e.g.*, Comments of BellSouth at 15 (describing an "inherent" capacity and safety limitation); Comments of Bell Atlantic at 14; Comments of MFS at 11 (noting that a LEC relying on § 224(f)(2) to refuse access "should be prepared to justify its decision based upon published and accepted safety or engineering standards"); Comments of Sprint at 16-17 (arguing that LEC claims of insufficient capacity should be examined on a case-by-case basis and observing that access will be limited by reliability and safety factors).

[67] Comments of AT&T at 16 (noting that 47 U.S.C. § 224(f)(2) "conspicuously declines to offer such grounds for refusal to incumbent LECs"). In contrast, *see, e.g.*, Comments of MCI at 23 (arguing that the LEC should prove that access is not "technically possible" before it is granted a waiver; no discussion of "electric utility" issue); Comments of Teleport at 8-9 (noting that an exception is provided to a "utility providing electric service" without addressing whether or not LECs may avail themselves of such an exception); Comments of Time Warner at 13-14 (noting exceptions to mandatory access for "electric utilities" in case of insufficient capacity or safety and proposing NESC standards to govern safety exemptions, without addressing whether or not LECs may avail themselves of such an exemption).

[68] Comments of GTE at 25.

that the FCC should acknowledge the importance of those standards and safety codes and respect attempts by LECs to adhere to them.[69]

GTE also noted in its initial comments that capacity is finite and that, at some point, the space available on poles or in conduits will, inevitably, exhaust.[70] As many commenters agree, the 1996 Act did not require LECs to build additional facilities for the new entrants -- their competitors -- when their own facilities were depleted.[71] GTE would be willing to engage in rearrangements to reclaim capacity, as long as it is compensated by the requesting entity for its costs, as is mandated by the statute.[72]

There is no need for a radical shift in the burden of proof applied in claims of unreasonable access denials, as suggested by some parties.[73] The

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[69] *See, e.g.*, Comments of Bell Atlantic at 14; Comments of BellSouth at 16; Comments of SBC Communications at 19.

[70] Comments of GTE at 26.

[71] Comments of Ameritech at 36-37; Comments of BellSouth at 15; Comments of NYNEX at 13.

[72] 47 U.S.C. § 224(i).

[73] *See, e.g.*, Comments of AT&T at 17 (contending that the burden is on the utility to show threat as "demonstrable, quantifiable, and cannot reasonably be accommodated"); Comments of MCI at 23 (exhorting the Commission to require the LEC to "bear the full burden of proving" that access is not technically possible before it is "granted" a "waiver"). GTE objects particularly strongly to MCI's suggestion that a LEC need to apply for a "waiver" when it is the new entrant who is taking advantage of the LEC's poles. The Commission should decline MCI's invitation to impose even greater ordeals on the already-burdened LECs than those anticipated by the amendments to the Pole Attachment Act.

party denying access will offer a *prima facie* reason for denial. The existing Commission process is adequate and bad faith on the part of the LECs should not be presumed.

The Commission simply cannot expect to anticipate and specify every conceivable reason of safety, reliability or engineering purpose that would justify a denial of access.[74] As others have observed,[75] the FCC does not have a full record of either the possible factual circumstances or the engineering concepts that would be necessary to create such an exhaustive inventory. Given the tremendous variations in local circumstances, the many different kinds of evolving technologies, and the multifarious ways in which they can be combined, creating a complete record would be largely impossible. The Commission would, thus, be better served by examining alleged safety, reliability and engineering issues on a case-by-case basis, if and when presented to it.

C. Notice (¶¶ 224-225)

GTE explained in its initial comments that arbitrary notice requirements for facilities modification applied without regard to the particular interests of the attaching parties would be inefficient and counterproductive. Not only can time frames for planning of work vary tremendously, from minutes in the

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[74] Comments of GTE at 25.

[75] *See, e.g.*, Comments of Bell Atlantic at 14.

case of emergency to weeks or months in the case of major projects, but parties may also not want notice of every modification or alteration. GTE suggested that it would be more efficient to permit the parties to negotiate the notice requirements that best meet their needs.[76] Other parties highlighted the importance of building flexibility into any notice requirement to accommodate responses to varying situations.[77] Those commenters that advocate more restrictive time frames without regard to real world safety and other considerations fail to deal with these practical concerns, and their arguments should be dismissed.[78]

D. Pricing (¶ 225)

The pricing of attachments historically has been left to private negotiations with state oversight. FCC complaint proceedings have been used only as a last resort. The statute and the legislative history provide absolutely no indication that Congress intended to change this successful

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[76] Comments of GTE at 27-28.

[77] *See, e.g.*, Comments of Ameritech at 39; Comments of Bell Atlantic at 15; Comments of NYNEX at 14; Comments of Pacific Telesis Group at 21-22.

[78] *See, e.g.*, Comments of AT&T at 20 (10 days' notice for modifying attachment; 60 days' notice for modifying the structure); Comments of MCI at 24-25 (180 days' written notice for all modifications); Comments of Time Warner at 15 (90 days' written notice for all modifications). *Cf.* Comments of MFS at 11-12 (90 days days' or longer advance notice depending on the scope of work required, except in cases of emergency, in which case the owner should give as much notice as is practicable).

allocation of responsibilities at this time. As GTE has previously noted, given the numerous circumstances surrounding pole attachments throughout the country, clear workable rules applicable to each unique case likely cannot be developed.[79] This view found broad support in the record,[80] which is conspicuously lacking in support for the promulgation herein of detailed pricing rules.[81]

The FCC should, however, expressly reject proposals for the application of non-compensatory pricing methods like TSLRIC.[82] GTE has explained the unlawfulness of such methods in its opening comments in this proceeding.[83]

E. Remedies

As GTE noted in its initial comments, the Commission can evaluate complaints regarding attachments on a case-by-case basis.[84] The FCC has an existing complaint mechanism that has worked effectively in the cable TV

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[79] Comments of GTE at 28.

[80] Comments of Ameritech at 33; Comments of Pacific Telesis Group at 22 (advocating "safe harbors" approach for pricing); Comments of USTA at 11; Comments of US West at 20.

[81] By contrast, the upcoming NPRM on pricing could provide a more suitable vehicle for examining the intricacies of pricing issues.

[82] *See, e.g.*, Comments of AT&T at 20-23; Comments of MCI at 23-24.

[83] *See* Comments of GTE, CC Docket No 96-98, at 65-72 (filed May 16, 1996).

[84] Comments of GTE at 29.

pole attachment context. No party has suggested anything unusual about the present context that would render the Commission's existing process, or state commissions' processes, inadequate.[85] To the contrary, many parties observed that the usual complaint mechanism can serve an important role in addressing the concerns of all parties.[86] Teleport's related proposal that an applicant be permitted to appeal any matter related to a pole attachment issue to federal court for injunctive relief is impractical and beyond the Commission's authority to implement.[87] Thus, no further FCC regulations are needed.

V. MOST COMMENTING PARTIES STRONGLY SUPPORT PROMPT IMPLEMENTATION OF THE FCC'S EXISTING NUMBER ADMINISTRATION GUIDELINES. (¶¶ 250-259)

As discussed in its opening comments, GTE agrees with the Commission's tentative conclusion that the proposals advanced in the *NANP Order*[88] satisfy the requirements of Section 251(e)(1) of the 1996 Act,

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[85] For example, AT&T's request for expedited review identifies no basis for distinguishing pole attachments from any other complaints before the Commission. *See* Comments of AT&T at 18.

[86] *See, e.g.*, Comments of Bell Atlantic at 14; Comments of MCI at 23, 25; Comments of Pacific Telesis Group at 18; Comments of SBC at 15; Comments of Sprint at 16.

[87] Comments of Teleport at 9.

[88] *Administration of the North American Numbering Plan*, 11 FCC Rcd. 2588 (1995) ("*NANP Order*") (*recon. pending*).

which mandates the establishment or designation of "one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[89] Most commenters addressing the issue endorse the Commission's proposals in this respect as well.[90]

Significantly, the vast majority of the commenters also urge the Commission to move expeditiously to implement its numbering plan decision by promptly naming the North American Numbering Council ("NANC") members and directing the selection of an administrator.[91] In view of the strong support in the record, GTE reiterates its request that the Commission move quickly to set the NANC in action. Numbering issues are becoming increasingly complex as a result of such developments as number portability and the prodigious rate at which new competition and new services are emerging. Consequently, the likelihood of significant numbering disputes has

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[89] 47 U.S.C. § 251(e)(1). *See also* Comments of GTE at 29-30.

[90] *See, e.g.*, Comments of Ameritech at 22; Comments of AT&T at 11; Comments of BellSouth at 19; Comments of Bell Atlantic at 9; Comments of The Cellular Telecommunications Industry Association at 1-2; Comments of MCI at 10; Comments of the National Cable Television Association, Inc. at 9; Comments of NYNEX at 18; Comments of Pacific Telesis Group at 24; Comments of SBC Communications Inc. at 9; Comments of Sprint Corp. at 12; Comments of US West at 1-2.

[91] *See, e.g.*, Comments of Ameritech at 22-23; Comments of AT&T at 11; Comments of Bell Atlantic at 9; Comments of BellSouth at 19; Comments of The Cellular Telecommunications Industry Association at 2; Comments of MCI at 10; Comments of the National Cable Television Association at 10; Comments of NYNEX at 18; Comments of OmniPoint Communications at 4-5; Comments of Pacific Telesis Group at 24; Comments of SBC Communications Inc. at 9; Comments of USTA at 14-15; Comments of US West at 3;

multiplied, making it crucial that the new administrator be designated and begin assuming its responsibilities promptly.

The FCC's proposal that, until the responsibility for the administration of numbers is transferred to the new NANP administrator, such functions should be retained by Bellcore, the LECs, and the states and performed in the manner that they are performed now also was positively received. Those addressing this issue largely agree that allowing these entities to continue to perform their respective functions related to number administration is a reasonable and administratively efficient interim solution.[92] Although MCI urges the Commission to take steps to ensure that Bellcore assigns NXX codes in a competitively-neutral manner,[93] Bellcore is already obligated to assign numbers in strict accordance with principles and guidelines established through industry consensus procedures. These procedures require, among other things, nondiscriminatory assignment practices.

The record strongly supports the Commission's tentative conclusion that matters involving the implementation of new area codes, including the determination of area code boundaries, should be delegated to affected state commissions, provided that state decisions comply with the Commission's

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[92] *See* Comments of Ameritech at 24; Comments of AT&T at 12; Comments of Bell Atlantic at 9; Comments of Pacific Telesis Group at 25; Comments of the Pennsylvania Public Utilities Commission at 6; Comments of SBC Communications Inc. at 11; Comments of US West at 2.

[93] Comments of MCI at 10.

numbering administration guidelines.[94] GTE agrees with this view, which is consistent with Commission precedent recognizing that, notwithstanding the Commission's broad authority to oversee number administration generally, state commissions are uniquely positioned to understand, judge, and determine state-specific numbering issues.[95]

GTE and numerous other commenters also endorse the Commission's tentative conclusion that its existing guidelines should serve as the standard for the allocation of new area codes.[96] In accordance with those practices, number administration practices must: (1) make numbering resources available in an efficient, timely manner; (2) should not unduly favor or disadvantage any particular industry segment or group of consumers; and (3) should not unduly favor one technology over another.[97] GTE submits

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[94] *See, e.g.*, Comments of Ameritech at 23-24; Comments of AT&T at 11; Comments of Bell Atlantic at 9; Comments of BellSouth at 19-20; Comments of the Michigan Public Service Commission at 8; Comments of the Pennsylvania Public Utilities Commission at 5-7; Comments of SBC Communications Inc. at 10; Comments of US West at 2;

[95] *See* Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, 10 FCC Rcd. 4596, 4601 (1995) ("*Ameritech Order*") (*recon. pending*).

[96] *See, e.g.*, Comments of AT&T at 12; Comments of Bell Atlantic at 9; Comments of BellSouth at 19-20; Comments of The Cellular Telecommunications Industry Association at 3, 5; Comments of Citizens Utility Company at 9; Comments of the Pennsylvania Public Utilities Commission at 5; Comments of Time Warner Communications Holdings, Inc. at 18; Comments of US West at 2.

[97] *Ameritech Order*, 10 FCC Rcd. at 4604.

that these guidelines will ensure that numbering mechanisms are applied in a carrier-neutral and technology-neutral fashion, consistent with the objectives of the 1996 Act.

Two CLECs nonetheless ask the Commission to adopt additional principles designed to discourage the use of overlays for the introduction of new area codes.[98] For example, MFS argues that even if number portability has been implemented, an overlay should be permitted only if every LEC authorized to operate within the Numbering Plan Area can receive at least one NXX code for each of its exchange areas from the original area code.[99] MCI contends that overlays should be used only as a last resort, and then only if substantial concessions are made to new entrants.[100] GTE submits that adoption of such limitations would unreasonably constrain states' discretion to address local numbering needs and would, thereby, require the subordination of the public interest to the self-interests of the carriers.

VI. CONCLUSION

For the foregoing reasons and in view of the overwhelming record support for its positions, GTE again urges the Commission to forego the establishment of intrusive federal mandates. Instead, the FCC should

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[98] Comments of MCI at 11-14; Comments of MFS at 7-9.

[99] Comments of MFS at 8.

[100] Comments of MCI at 11-14.

expressly accept the outcomes for LEC disclosure of technical changes, dialing parity, access to poles, conduits and rights-of-way, and numbering administration set out herein as consistent with its reasonable guidelines for implementation of the requirements of the Telecommunications Act of 1996.

Respectfully submitted,

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June 3, 1996

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments" have been mailed by first class United States mail, postage prepaid, on June 3, 1996 to all parties of record.

Ann D. Berkowitz